(18,822.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 594.

SAMUEL M. DAMON, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 In the Supreme Court of the United States.

SAMUEL M. DAMON, Plaintiff in Error,
vs.
THE TERRITORY OF HAWAII, Defendant in Error.

Affidavit of Value.

TERRITORY OF HAWAII, *Island of Oahu*, } *ss:*

Samuel M. Damon of Honolulu, in the island of Oahu, Territory of Hawaii, plaintiff in the above entitled action being duly sworn deposes and says; that the sea fishery the subject matter of litigation in the above entitled action set out and described in the bill of complaint filed in said action, is of more than the value of five thousand dollars ($5,000) towit, of the value of sixteen thousand dollars ($16,000) and upwards, and that said fishery has hitherto been assessed for taxation purposes in the sum of twelve thousand dollars, and that taxes have been paid by him on said fishery on said valuation; and that said fishery at the time of the filing of said bill of complaint and at the present time is of the value last named.

And further deponent saith not.

S. M. DAMON.

Subscribed and sworn to before me this 14th, day of January, A. D. 1903.

[Seal of Benj. L. Marx, Notary Public, Territory of Hawaii.]

BENJ. L. MARX,
Notary Public, First Judicial Circuit, Territory of Hawaii.

2–4 [Endorsed:] Supreme Court, of the United States. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Affidavit of value. Filed January 14 A. D. 1903. Henry Smith clerk of supreme court of the Territory of Hawaii.

5 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the said suit between Samuel M. Damon, plaintiff and The Territory of Hawaii, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the

United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said Territory, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission had under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Samuel M. Damon, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
6 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 14 day of January, in the year of our Lord one thousand nine hundred and three.

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by
CLINTON A. GALBRAITH,
Presiding Justice of the Supreme Court of the Territory of Hawaii.

7 [Endorsed:] In the Supreme Court of the United States. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Writ of error. Issued and filed January 14 A. D. 1903. Henry Smith clerk of the supreme court of the Territory of Hawaii.

8 In the Supreme Court of the United States.

SAMUEL M. DAMON, Plaintiff in Error,
vs.
THE TERRITORY OF HAWAII, Defendant in Error.

Assignment of Errors.

On a final judgment of the supreme court of the Territory of Hawaii, entered on the 1st, day of December, A. D. 1902, wherein the above named Samuel M. Damon was plaintiff and the above

named Territory of Hawaii was defendant, the said Samuel M. Damon upon a writ of error upon said judgment of said supreme court of said Territory of Hawaii, returnable within thirty days after the date of said writ of error to a Supreme Court of the United States at Washington, in the District of Columbia, assigns for error in the record and judgment aforesaid the following, to wit:

That the judgment rendered in the said supreme court of the said territory of Hawaii in said cause being the highest court of law and equity in said Territory of Hawaii in which a decision could be had therein, should be reversed for the following reasons, to wit:

1. That the said supreme court of the Territory of Hawaii erroneously decided and adjudged upon a bill of exceptions duly taken and allowed to certain rulings of the circuit court for the first judicial circuit of the Territory of Hawaii, at a July term, A. D. 1902, of said court, in and upon the trial of said cause, said cause be-
9 ing brought under and by virtue of sections 95 and 96 of an act of Congress entitled, "An act to provide a government for the Territory of Hawaii," passed by the Fifty-sixth Congress of the United States of America on the 7th day of April, A. D. 1900, that a non-suit was properly ordered by said circuit court in said cause at the close of the plaintiff's case; said circuit court having directed a non-suit on the following grounds:

(1.) That no title to the fishery claimed passed to the said plaintiff's grantors by virtue of royal patent No. 7858;

(2.) That no vested right in a sea fishery as against the Territory of Hawaii could have been acquired by virtue of the laws of the Kingdom of Hawaii respecting fisheries, and that upon the repeal of said laws respecting fisheries by the organic act that the plaintiff's rights in said sea fisheries became terminated;

That the evidence adduced at said trial by the admission of the defendant filed in said cause in response to a notice served by the plaintiff of intention to prove certain facts and documents showed;

(1.) That a document was issued by the government of the Kingdom of Hawaii entitled royal patent No. 7858 to Lot Kamehameha on the 28th day of August, A. D. 1890, and that said document is an original document and is signed and executed as it purports to have been and is in the words and figures following:

"(Revenue stamp $1.00.) No. 7858.

Royal Patent.

Upon confirmation of land commission award.

Whereas the board of commissioners to quiet land titles
10 have by their decision awarded unto Lota Kamehameha Kuleana Helu 7715. Apana 2. An estate of freehold less than Allodial, in and to the land hereafter described, and whereas proper application having been made to the minister of the interior for a royal patent on the within described land a certificate of boundaries defining the same having been duly filed, and whereas

the government commutation thereon was relinquished by resolution of the privy council adopted August 27th A. D. 1850.

Therefore, Kalakaua, by the grace of God, King of the Hawaiian islands, by this royal patent, makes known to all men, that he has, for himself and his successors in office, this day granted and given absolutely, in fee simple, unto Lota Kamehameha all that certain piece of land situated at Kona, known as the Ahupuaa of Moanalua in the island of Oahu and described as follows:

Commencing at a point on the sea shore called "Kumumau" on the west bank of a small stream, the station being marked by coral stones buried in the sand so as to form a cross, with point thus ↑ indicating true north, from this point the government survey station "Puuloa" bears N. 73° 10′ W. true 8220 feet, the Ewa church bears N. 22° 7′ W. true, Salt Lake station bears N. 39° 1′ E. true and Diamond Head station bears S. 65° 13′ E. true. The magnetic declination being 9° 35′ east.

The boundary runs,

1. N. 6° 00′ E. true 3510 feet along Halawa along the edge of Kalihi fish pond Lelepaua, to east angle of the fish pond Waiaho adjoining Old Salt Works.

2. N. 13° 50′ W. true 3475 feet along Halawa (crossing the road from Honolulu to Puuloa) to a pile of coral stone from which Ewa church bears N. 27° 36′ W. true Thence

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3. N. 47° 5′ E. true 12800 feet along Halawa to an iron pin on the ridge surrounding Aliamanu from which point Salt Lake station bears N. 75° 54′ E. true. Thence

4. N. 34° 10′ E. true 1720 feet along Halawa, and the ridge above mentioned.

5. N. 76° 50′ E. true 4040 feet along Halawa bearing the ridge on the right to the ancient land mark called "Kekaananiau o Kapukaki," from which Salt Lake station bears S. 13° 2′ W. true 1160 feet.

6. N. 53° 45′ E. true 675 feet along Halawa to rock marked H & M makai of Government road.

7. N. 66° 24′ E. true 11140 feet along Halawa up dividing ridge to red hill, Thence

8. N. 57° 44′ E. true 14650 feet along Halawa the boundary being the water shed of the dividing ridge of the Halawa and Moanalua valleys to peak overlooking Koolau.

9. S. 61° 31′ E. true 5743 feet along Heeia to the top of the ridge, being the boundary to peak called Keahiakahoe, Thence,

10. S. 14° 48′ E. true 3840 feet along Kaneohe, the top of the ridge being the boundary to a ridge adjoining Kalihi valley,

11. S. 63° 7′ W. true 7370 feet along the top of the dividing ridge between Kalihi valley and Moanalua along Pohakuawaawa L. C. award 6450 Apana 10 to Kaunuohua, Government land Hueu, Mahele award 56, and Kekuapalau L. C. award 6450 Ap. 9 to Kaunuohua, to head of the land of Kahauiki

12. S. 86° 38′ W. true 2020 feet along Kahauiki, the top of the ridge being the boundary, to place called Punakalai;

13. S. 57° 25′ W. true 3460 feet along Kahauiki the
12 top of the ridge being the boundary to place called Huluena;

14. S. 77° 6′ W. true 1577 feet along Kahauiki the top of the ridge being the boundary;

15. S. 59° 6′ W. true 4003 feet along Kahauiki the top of the ridge being the boundary to place on ridge called Mailehahai.

16. S. 57° 35′ W. true 4751 feet along Kahauiki the top of the ridge being the boundary;

17. S. 38° 15′ W. true 3828 feet along Kahauiki passing the hill Puukapu;

18. S. 1° 15′ W. true 1254 feet along Kahauiki to a large rock on mauka side of Gov't road marked ◇ and called Pohakuaukai;

thence

19. S. 11° 5′ W. true 1168.2 feet along Kahauiki crossing Gov't road; thence

20. S. 26° 15′ W. true 415.8 feet along Kahauiki to a large rock in fish pond wall marked with a cross, from which rock the Gov't survey station Hauiki bears N. 68° 28′ E. true 5348 feet and Mokauea station bears N. 86° 55′ E. true 8283 feet;

21. Along the fish pond walls, between the ponds of Weli and Kaihikapu to the island of Mokumoa, thence along the Weli side of the island of Mokumoa to sea wall of Weli, thence along shore at high water mark, and along the outer walls of the fish ponds Kaihikapu, Mapunapuna, Awawaloa, and Kaloaloa to place of beginning.

22. There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows: From the point just mentioned in the sea wall of Weli, straight across the channel to
13 a point called Kaoki near the island of Mokuonini or Mokupilo, thence along edge of deep water, on right side of channel to place called Kai-iki outside of island of Mokuoeo where the sea breaks, thence to point called Pahunui at edge of deep water, thence to coral called Hanaweke on edge of deep and shallow water; thence to bunch of coral called Namahana, then to Kalamake—thence along edge of reef to Lamaina, then to Koke which is south of Ahua point, then to Kukukahi then to Auwaiomiki, then to Palani a bunch of coral which is directly south of, or makai of Kumumau, thence to initial point Kumuma'u; The direct bearing and distance from rock in wall of Weli and Kaihikapu ponds to Kumuma'u is S. 67° 50′ W. true 21040 feet.

Area above low water mark 9.045 acres, exclusive of the Government ponds of Kaihikapu and Lelepaua.

The islands of Mokumoa, Mokuonini and Mokuoeo are a part of Moanalua, and are included in the above area.

Containing an area of 9.045 acres more or less: excepting and reserving to the Hawaiian government, all mineral or metallic mines of every description.

To have and to hold the above granted land in fee simple unto the said Lota Kamehameha his heirs and assigns forever, subject to

the taxes to be from time to time imposed by the legislative council, equally upon all landed property held in fee simple.

In witness whereof I have hereunto set my hand and caused the great seal of the Hawaiian islands to be affixed this 28th day of August, 1890.

[SEAL.] (Signed) KALAKAUA REX.

By the King:

The minister of the interior.

(Signed) C. N. SPENCER."

14 (2.) That Lot Kamehameha (Kamehameha V) died intestate on the 11th., day of December, A. D. 1872 and on September 11th, 1873 a decree was filed in the supreme court of the Hawaiian islands distributing said estate to Ruth Keelikolani as sole heir, including the property described in royal patent No. 7858.

(3.) That Ruth Keelikolani died on the 25th, day of May, 1883 after having made and executed her last will and testament; that said will was duly admitted to probate in the supreme court of the Hawaiian islands on June 22nd, 1883; that in said will the property described in royal patent No. 7858 was devised to Bernice Pauahi Bishop.

(4.) That Bernoce Pauahi Bishop died on the 16th day of October, A. D. 1884 after having made and executed her last will and testament and two codicils; that said will and two codicils were duly admitted to probate in the supreme court of the Hawaiian islands on December 22nd, 1884; that in said will and two codicils the property devised in royal patent No. 7858 was devised to Samuel M. Damon the plaintiff herein.

That thereafter and upon said trial prior to the granting of said motion for non-suit said original royal patent No. 7858 a copy of which is set out above was offered in evidence by said plaintiff and was admitted in evidence by the court.

That thereafter and upon said trial prior to the granting of said motion, a witness; to wit, one TIMOTEO HEU, called for said plaintiff, testified upon questions asked by counsel for plaintiff as follows:

Q. Where do you live, Heu?

A. I am living at Kahakaulana and now I am living Mauka of that on one of the Bishop pieces of property.

Q. How old are you, Heu?

A. 70.

Q. Where were you born?

A. On Kauai.

Q. How long have you lived on the island of Oahu?

15 A. Quite a long while. Where I have been living and fishing I have been forty years there and four years up Lahaina at school and down to Kauai, Waiohi, four years, and from Waiohi I was called up here.

Q. Do you know the Ahupuaa of Moanalua?

A. Yes sir.

Q. Has that land any sea fishery?

A. It has and it is the biggest fishery right on that side of the islands.

Q. Who is in charge of that fishery at the present time?

A. It is under Sam Damon.

Q. And who is in actual charge of the fishery itself?

A. Heu, myself. I lease it from him for a thousand dollars a year.

Q. Do you know the boundaries of that fishery?

A. Yes sir.

Q. How long have you been familiar with this fishery belonging to the Ahupuaa of Moœnalua?

A. 1862 I lived on the place, having married a woman belonging to the land Kahakaulana, and had children by her there and remained on the property ever since and I am still there. When I first lived on the place Kamehameha Fourth, called Liholiho was reigning at the time and had this property.

Q. Had this property?

A. He had the property at that time and when he died then it descended to Kamehameha Fifth, Lot Kamehameha.

Q. Kamehameha Fourth had it?

A. When I first moved there Kamehameha Fourth had it and then from Kamehameha Fourth it descended to Kamehameha Fifth or Lot Kamehameha.

Q. And do you know when that was?

A. That was in the year 1862 when I first moved down there. He was the owner of the property; he was still alive at that time.

16 Q. What sort of authority did he exercise over this fishery?

A. He held control of the property and the natives that were living under him went fishing, permitted by him to go fishing on the division plan. If they would catch the fish they would sell the fish and divide the money, a portion to the King and a portion to themselves. At times they would catch fish but didn't sell it at all but would take all the fish to the King.

Q. This is Kamehameha Fourth that you are speaking about?

A. The same with Kamehameha in either case. The last is Sam Damon, divisions are different; the manner——

Q. During Kamehameha Fourth's life was this fishery ever thrown open to the public?

A. No.

Q. Were people from any other land except Moanalua allowed to fish there?

A. No.

Q. What claim did Kamehameha Fourth make to the fishery of Moanalua?

A. The mullet was especially claimed by the King and everybody was debarred from taking that fish. The other fish that ran in the waters of Moanalua were free to the people that belonged to the land and no other—no one from Honolulu or any other part of the islands.

Q. How did Kamehameha Fourth enforce that claim of his?

A. He enforced it by having the people under him to carry out his will in the matter.

Q. State whether or not anybody was appointed especially to look after this fishery?

A. Yes sir, a person by the name of Kilinaihe who was a kahu of the King's was delegated and had power to attend to the affairs of Moanalua, fishery and all.

Q. What acts were done to show the fact that the King claimed this as his fishery and that the public were not allowed to fish on it?

A. Because it was all understood that Kamehameha
17 Fourth being the chief, was the owner and possessor of the sea right and everybody respected it and it was so in case of Kamehameha Fifth, when he ascended that same right was understood by all the people of the country.

Q. Were any marks put up at any time, stakes or anything?

A. There were certain marks planted all around the sea fishery, and it was done during the month of January on the night of Kane and it was as I say, planted all around and everybody was tabooed from interfering with the sea. And when these marks were planted around the sea fishery the people of the land even were forbidden from going and fishing during those three months of the taboo.

Q. Under whose direction was this taboo enforced?

A. Under the direction of Klinaihe the King's man, this taboo was placed, an embargo on it to prevent the fish from all being taken away, that is to give them a chance to grow.

Q. How long did that course continue?

A. That process was carried out during Kamehameha Fourth's reign and also during Kamehameha Fifth's reign, every year. Every year that process of putting a taboo for three months on the sea fishery to give the spawn an opportunity to grow without being cleaned out as they do now-a-days was carried on during Kamehameha Fourth's time and also during Kamehameha Fifth's time.

Q. Now under Kamehameha Fifth was there any claim of ownership to that fishery?

A. He came into possession of the inheritance and continued the right under him, received as King and as sovereign and the taboos were put on by him under the direction of his man, this Kilinaihe.

Q. And how long did that continue?

A. It begun with the death of his brother, his predecessor,
18 until his death and successor. Those were rights continued from one King to the other and only ceased under the charge of ownership.

Q. When did Kamehameha Fifth own this land of Moanalua, the land?

A. It was there and when Kamehameha Fourth died, Liholiho, he succeeded in inheriting all that Kamehameha Fifth possessed that is all the lands, and Kilinaihe was the luna of the land under Kamehameha Fourth but Kaleilikeole succeeded him; that was his cover.

Q. How was King Kamehameha Fifth—in what capacity was he

acting in regard to this fishery; whether it was owner of the lands or as King?

A. He exercised the right as Lot Kamehameha, not as the sovereign but as the prince, the subject, and the one preceded him exercised the same right, and when he inherited his right he continued to exercise it until Pauahi Bishop got possession of the land.

Q. Was that as owners of the Ahupuaa of Moanalua?

A. In both capacities. Not only as owner but also as the sovereign.

Q. After Lot Kamehameha died, that is Kamehameha Fifth, who did this fishery go to and the land of Moanalua?

A. It descended to Keliikolani, and when Kaleilikeole died Simon Kaai became luna.

Q. What did Keliikolani have possession of down there?

A. The whole Ahupuaa, land and sea.

Q. Who did she put in charge of the fishery?

A. She established me there is charge of the fishery. Simon Kaai was Keliikolani's agent in charge of the property and I was placed in charge there of the sea fishery.

Q. What year were you placed in charge of the sea fishery?

A. I think I was put the same year that Keliikolani died, in 1883.

19 Q. And after her death who cintinued you in charge down to the present time?

A. Simon Kaai continued me in charge of the place.

Q. Who was the owner of the land and fishery after Keliikolani's death?

A. Pauahi.

Q. And what sort of claim did she make to this fishery?

A. The same right that passed from one King to the other and from them to Ruth Keliikolani, and from her to her cousin Mrs. Bishop, they being from the descendants of the chief and stood in the line of succession to this land.

Q. And did Keliikolani and Mrs. Bishop make the same claim that Kamehameha Fourth and Kamehameha Fifth did to this fishery?

A. Yes, just the same as the two sovereigns owned and possessed the land, so did the ladies after them.

Q. What did they do in regard to this fishery to show their ownership?

A. In the case of Mrs. Pauahi Bishop I have heard that possession was handed over to Mr. Damon. Whether it was by a deed or by oral—or in an oral manner or whether by sale or what it was, you ought to be better posted on that than myself.

Q. What I want to know is what Mrs. Bishop did in regard to the people at large, the general public, going on that fishery?

A. She showed her ownership as the lord of the sea and land by appointing Mr. Damon or giving him the property and setting him in possession over the land and fishery.

Q. Were the public allowed to fish on that during her lifetime?

A. No one from outside the Ahupuaa.

Q. Have the public been allowed to fish on that fishery at any time down to the present time?

A. The same old established custom has been continued up to the present time, that is even now. That is, the people of the
20 land were allowed to go and do their fishing, reserving—excepting the special fish that had been distributed from the owner of the land, that is the mullet and they are allowed to go there and fish and they only. People on the outside never have been allowed to go there and fish. I have been sixteen years under this foreigner, Sam Damon paying him one thousand three hundred dollars the year for the right, the fishing right, and the same prohibition exists now as it did then, no one from the outside is allowed to go there and exercise any rights, and my master, the one that is over me, Mr. Damon had told me last June, told me, "We have one year more and then our rights will be abolished. We have no more rights and then they will be taken away the coming June." That is what he told me, he seemed to foresee that there was some change to take place, perhaps that may be taken, place, perhaps not, I don't know.

That thereafter and prior to said motion and upon cross-examination by counsel for defendant, said witness testified:

Q. This fishery of Moanalua extends from the beach out to the reef, don't it?

A. From the reef where the sea breaks right onto the main land, all that water in between that and the main land where the grass commences to grow, right parallel and mauka of the railroad track at the present time belongs to the sea fishery.

Q. By what, where the grass begins to grow you mean the beach don't you?

A. The kumu mau, I have reference to is that kumu mau where the boundary at Kaleikau is that which separates the Moanalua boundary from the adjoining land, on the Ewa side and from there run out to sea, eastward to the reef, following the reef until
21 it reaches this boundary of Kalihi, then running inland.

Q. Then it extends along the entire frontage of the Ahupuaa, the sea frontage, does it?

A. Yes sir.

Q. Has the mullet always been the taboo fish in that fishery?

A. Yes sir, the anae is the taboo fish.

Q. And it is the right to the taboo fish that you leased from the owner of the land?

A. Yes sir. If the stragglers besides the mullet happen to get into my net, why it is mine.

Q. And during all this time the tenants on the Ahupuaa have had and exercised their rights in the fishery, have they?

A. Yes sir.

Q. The rights of a tenant being to take fish other than the mullet?

A. Yes sir, they have done that and do take it not and eat it and sell it, bar-ing the people that don't belong on the land, that are out-

side of it; altogether they have no right to come in whatever to take fish, eat or sell it."

2. That the said supreme court of said Territory of Hawaii erroneously decided and adjudged upon the testimony set out as aforesaid that no vested right in a sea fishery as against the Territory of Hawaii could have been acquired by virtue of the laws of the Kingdom of Hawaii respecting fisheries and that by the repeal of said laws respecting fisheries by the organic act, that plaintiff's rights in said sea fishery became terminated.

That all of said errors appear upon the record of said cause and in the decision and judgment of said supreme court of said Territory of Hawaii, and the said Samuel M. Damon, plaintiff in error, prays
22 that the judgment of said supreme court for the said Territory of Hawaii for the errors aforesaid and for other errors manifest in said record and proceedings, may be reversed, annulled and held for naught; and that the plaintiff in error herein may be restored to all things that he has lost by reason of said judgment.

REUBEN D. SILLIMAN,
Counsel for Plaintiff in Error.

23 [Endorsed:] In the Supreme Court of the United States. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Assignment of errors. Filed January 14, A. D. 1903 Henry Smith clerk of the supreme court of the Territory of Hawaii.

24 *Citation.*

United States of America to the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington in the District of Columbia, within thirty days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the supreme court of the Territory of Hawaii wherein Samuel M. Damon is plaintiff in error and you Territory of Hawaii are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Clinton A. Galbraith, presiding justice of the supreme court of the Territory of Hawaii this 14th day of January, A. D. 1903.

CLINTON A. GALBRAITH,
Presiding Justice of the Supreme Court of the Territory of Hawaii.

Service of copy of above citation hereby admitted this 14th day of January 1903.

ROBERTSON & WILDER,
Of Counsel for Territory of Hawaii.

E. P. DOLE,
Att'y General.

25 [Endorsed:] In the Supreme Court of the United States. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Citation. Filed January 14 A. D. 1903. Henry Smith clerk of the supreme court of the Territory of Hawaii.

26 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, May Term, 1902.

($2.00 revenue stamps.)

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishing Right.

To the Honorable A. S. Humphreys, first judge of the circuit court for the first judicial circuit:

The undersigned, Samuel M. Damon of Honolulu, island of Oahu, Territory of Hawaii, plaintiff, complains of The Territory of Hawaii, defendant, and for cause of action shows:

1. That the plaintiff claims a vested right as sole and exclusive owner in fee simple of all that certain sea fishery within the reef, the same not being a pond or artificial enclosure, situated at Moanalua in the district of Kona, island of Oahu, bounded and described as follows:

"From the point just mentioned in the sea walls of Weli straight across the channel to a point called Kaoki near the island of Mokuonioni or Mokupilo, thence along edge of deep water on right side of channel to place called Kai-iki outside of island of Mokuoeo where the sea breaks; thence to point called Pahunui at edge of deep water, thence to coral called Hanaweke on edge of deep water and shallow water; thence to bunch of coral called Namahana, then to Kalamake, thence along edge of reef to Lamaina, then to Koke which is south of Ahua point, then to Kukukahi, then to Auwaiomiki, then to Palani a bunch of coral which is directly south of or
27 makai of Kumumau, thence to initial point Kumumau. The direct bearing and distance from rock in wall or Weli and Kaihikapu ponds to Kumumau is S. 67° 50′ W. true 24040 feet."

That the fishery to which the plaintiff claims to be entitled as aforesaid consists of the right each year to set apart for himself for his sole and exclusive use within the fishing grounds within the metes and bounds above set out, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right, in lieu of setting apart some particular fish to his exclusive use, to prohibit, upon consultation with the tenants of his lands, all fishing upon the fishing grounds within the metes and bounds above set forth during certain months of the year; and during the fishing season to exact from each fisherman one third of all the fish taken upon said fishing ground.

That from time immemorial said fishery has been appurtenant to the Ahupuaa of Moanalua situated in the district of Kona, island of

Oahu, and plaintiff and his grantors have acquired a title by prescription to said fishery which has become a vested right by the exclusive use of the same for a period of twenty years and over prior to the commencement of this suit; and also the plaintiff and his grantors from time immemorial have had and enjoyed the exclusive ownership and possession of said fishery, subjects only to the rights of tenants on said land of Moanalua and to such laws as have been enacted from time to time regulating fisheries.

That said fishery was confirmed to L. Kamehameha by royal patent No. 7858 under whom the plaintiff claims an absolute estate in fee simple in said fishery by purchase by various mesne conveyances devises and descents.

28 That said defendant The Territory of Hawaii claims an interest in said fishery adverse to the plaintiff and is a necessary party to the complete determination of the questions involved in this action.

Wherefore the plaintiff prays that said defendant The Territory of Hawaii and all other persons claiming an estate or interest in said fishery adversely to the plaintiff may be summoned to appear and answer this complaint before a jury of the country at the May term 1902 of this court, unless sooner disposed of by judicial authority; and that plaintiff may have judgment establishing his right to said fishery and for costs.

(Signed) S. M. DAMON.

HATCH & SILLIMAN,
Attorneys for Plaintiff.

TERRITORY OF HAWAII, } ss:
Island of Oahu, }

Personally appeared Samuel M. Damon, who being duly sworn deposes and says that he has read the foregoing complaint and knows the contents thereof; that the matters therein alleged are true of his own knowledge, except such as are alleged on information and those he believes to be true.

(Signed) S. M. DAMON.

Subscribed and sworn to before me this 3rd day of February 1902.

[SEAL.] (Signed) J. HARRIS MACKENZIE,
Notary Public, 1st Judicial Circuit.

(Endorsed:) Filed Feb. 6 1902 (S.) A. G. Kaulukou clerk.

29 In the Circuit Court of the First Circuit, Territory of Hawaii.

($2.00 stamps.)

SAMUEL M. DAMON
v.
THE TERRITORY OF HAWAII. } Term Summons.

The Territory of Hawaii to the high sheriff of the Territory of Hawaii, or his deputy, the sheriff of the island of Oahu, or his deputy:

You are commanded to summon The Territory of Hawaii defendant in case it shall file written answer within twenty days after service hereof, to be and appear before the said circuit court at the May term thereof, to be holden at Honolulu, island of Oahu on Monday the 5th, day of May next, at 10 o'clock a. m., to show cause why the claim of Samuel M. Damon, plaintiff, should not be awarded to him pursuant to the tenor of his annexed petition.

And you are commanded to * * * And have you then there this writ with full return of your proceedings thereon.

Witness Hon. A. S. Humphreys, first judge of the circuit court of the first circuit, at Honolulu, Oahu, this 6th, day of February, 1902.

[SEAL.] (Signed) A. G. KAULUKOU, *Clerk.*

(Endorsed:) L. 5163. 18/418.—Circuit court, first circuit.—Samuel M. Damon, *v.* Territory of Hawaii.—Term summons.—Issued at 11.45 o'clock p. m., February 6, 1902. (Sig.) A. G. Kaulukou, clerk. Returned at 3.10 o'clock p. m., February 6, 1902. (Sig.) A. G. Kaulukao, clerk.

30 Served the within summons as follows:

On the Territory of Hawaii through E. P. Dole its attorney general at Honolulu, island of Oahu, Territory of Hawaii, on the 6th day of February, A. D. 1902, by delivering to him a certified copy thereof, and of the petition hereto annexed, and at the same time showing him the original as directed.

Dated February 6th, 1902.

Honolulu, Oahu.

(Signed) ALBERT McGURN,
Deputy Sheriff.

31 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, May Term, 1902.

SAMUEL M. DAMON, Plaintiff,
v.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishery Rights.

Defendant's Answer.

Now comes the defendant above named, and answering to the plaintiff's complaint herein denies that it has any knowledge or in-

formation sufficient to form a belief in regard to any of the allegations in the plaintiff's complaint contained, and therefore, denies each and all of them.

TERRITORY OF HAWAII,
(Signed) By E. P. DOLE, *Attorney General.*

TERRITORY OF HAWAII, } ss:
Island of Oahu, }

E. P. Dole, being duly sworn, deposes and says: That he has read the foregoing answer knows the contents thereof, and that the
32 allegations therein contained are true.

(Signed) E. P. DOLE.

Subscribed and sworn to this 11th day of February, 1902, before me.

(Signed) JNO. M. KEA,
[NOTARIAL SEAL.] *Notary Public, First Judicial Circuit, Haw'n Islands.*

Service of the foregoing answer admitted this 11th day of February, 1902.

(Signed) HATCH & SILLIMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed Feb. 11 1902 (S.) A. G. Kaulukou clerk.

33 In the Circuit Court of the First Circuit, Territory of Hawaii, Special July Term, 1902.

SAMUEL M. DAMON
vs.
TERRITORY OF HAWAII. } Action to Establish Fishing Right.

Motion.

Now comes the Territory of Hawaii, by E. P. Dole, attorney general, and moves the court here to advance the above entitled cause upon the calendar of causes for trial at this present term of this court and that a day be specially set for the trial of said cause.

This motion is based on the record herein and upon the affidavit of A. G. M. Robertson hereto attached and made part hereof.

Dated Honolulu, July 2, 1902.

TERRITORY OF HAWAII,
(Signed) By E. P. DOLE, *Attorney General.*

ROBERTSON & WILDER, *Of Counsel.*

To Messrs. Hatch & Silliman, attorneys for plaintiff:

Please take notice that we shall present the foregoing motion to the court on Monday July 7, 1902, at 10 o'clock a. m. or as soon thereafter as we may be heard.

(Signed) ROBERTSON & WILDER,
Of Counsel for Defendant.

34 TERRITORY OF HAWAII, } ss:
Island of Oahu, }

A. G. M. Robertson, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the cause entitled Samuel M. Damon *vs.* Territory of Hawaii; that said action is one of many that have been filed under and pursuant to the provisions of section 96 of the organic act of the Territory of Hawaii for the purpose of establishing alleged fishing rights; that seventy-eight such actions have been filed and are now pending in the several circuit courts of said Territory; that none of them have yet been tried; that said actions may be divided into two principal classes, to wit, claims under patents, and claims under the statutes governing konohiki rights without award or patent; that the above entitled cause belongs to the first mentioned class; that said actions are of much importance to the Government and the public; that it is desirable that the opinion of the Supreme Court should be had at an early a date as possible upon the general questions involved in both classes of cases and to that end it is proposed that one case from each class be selected and tried and carried through to final determination in the Supreme Court; that deponent believes that the course suggested will save expense to the Government as well as litigants and will also save the courts much time.

(Signed) A. G. M. ROBERTSON.

Subscribed and sworn to before me this 3rd day of July, A. D. 1902.

(Signed) GEORGE LUCAS,
Clerk First Judicial Circuit.

(Endorsed:) Filed July 3, 1902 (S.) George Lucas, clerk.

35 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, May Term, 1902.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishing Right.

Take notice that the plaintiff proposes to prove the several facts and documents hereunder specified, and that such documents may be inspected by the defendant, its attorneys or agents at the office of Messrs. Hatch & Silliman, attorneys for plaintiff on Thursday the third day of July next between the hours of nine o'clock a. m. and four o'clock p. m., and that the defendant is hereby required within forty-eight hours from the last mentioned hour to admit the said several facts, and that said document specified to be original was written, signed, or executed as it purports to have been, saving all just exceptions to the admissibility of all such facts and documents as evidence in this cause.

Dated this second day of July, 1902.

(Signed) HATCH & SILLIMAN,
Attorneys for Plaintiff.

To Messrs. Robertson & Wilder, attorneys for defendant.

36 Original.

Description of document.	Date.
1. Royal patent No. 7858 to Lot Kamehameha.....	August 28, 1890

Facts.

1. That Lot Kamehameha (Kamehameha V) died intestate on the 11th day of December, 1872. That on September 11, 1873 a decree was filed in the supreme court of the Hawaiian islands distributing said estate to Ruth Keelikolani as sole heir, including the property described in royal patent No. 7858.

2. That Ruth Keelikolani died on the 25th day of May, 1883, after having made and executed her last will and testament. That said will was duly admitted to probate in the supreme court of the Hawaiian islands on June 22, 1883. That in said will the property described in royal patent No. 7858 was devised to Bernice Pauahi Bishop.

3. That Bernice Pauahi Bishop died on the 16th day of October, 1884, after having made and executed her last will and testament and two codicils. That said will and codicils were duly admitted to probate in the supreme court of the Hawaiian islands on December 2, 1884. That in said will and codicils the property described in royal patent No. 7858 was devised to Samuel M. Damon, plaintiff herein.

We admit original #1, and facts #1, 2 & 3.
July 2, 1902.
(Signed) ROBERTSON & WILDER,
Of Counsel for Defendant.

(Endorsed:) Filed July 3, 1902 (S.) George Lucas clerk.

37 In the Circuit Court of the First Circuit, Territory of Hawaii, Special July Term, 1902.

SAMUEL M. DAMON
vs.
TERRITORY OF HAWAII. } Action to Establish Fishing Right.

Judgment.

This action by petition claiming a vested right in and to the sea fishery of Moanalua, Oahu, and asking that the same might be established and awarded to plaintiff, came to the May 1902 term and thence by continuance to the present term when the parties appeared and were at issue to the jury. The plaintiff having adduced his evidence and rested his case the defendant moved for a non-suit which the court granted.

Therefore it is adjudged that the plaintiff do pay the costs of said action, taxed at $16.00

By the court,

(Signed) J. A. THOMPSON, *Clerk.*

Entered this 15th day of July, A. D. 1902.

(Endorsed:) Filed July 15 1902 (S.) J. A. Thompson clerk.

38 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Special July Term, 1902.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishing Right.

Plaintiff's Bill of Exceptions.

Be it remembered that the above entitled cause came on for hearing before a jury of the country at this special July term A. D. 1902 of this court:

Plaintiff offered in evidence a written admission of facts signed by defendant's counsel on file in said cause, marked Exhibit "A," showing title to the Ahupuaa of Moanalua in the plaintiff.

Plaintiff also offered in evidence royal patent No. 7858 to L. Kamehameha, marked Exhibit "B." Said Exhibits "A" and "B" are hereby made a part of this bill of exceptions.

Plaintiff further offered the testimony of a witness, Heu, the transcript of the testimony of said witness when filed is to be taken as a part of this bill of exceptions.

Upon the close of plaintiff's case counsel for defendant moved the court to direct a non-suit on the following grounds:

1. That no title to the fishery claimed passed to the plaintiff's grantors by virtue of said royal patent No. 7858.
2. That no vested right in a sea fishery as against the Territory of Hawaii could have been acquired by virtue of the laws of the Kingdom of Hawaii respecting fisheries and that upon the repeal
39 of said laws respecting fisheries by the organic act that plaintiff's rights in said sea fishery became terminated.

The court granted the non-suit as prayed for, to which ruling of the court, the plaintiff duly excepted and his exception was allowed.

All pleadings and papers on file in this cause and also the reporter's notes of evidence, are made a part of this bill of exceptions.

Dated this 17 day of July, 1902.

The above bill of exceptions being found conformable with the truth, is hereby allowed.

(Signed) A. S. HUMPHREYS,
First Judge of the Circuit Court for the First Circuit.

HATCH & SILLIMAN, *For Pl'ff.*

40 (EXHIBIT "A" OF BILL OF EXCEPTIONS.)

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, May Term, 1902.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishing Right.

Take notice that the plaintiff proposes to prove the several facts and documents hereunder specified, and that such documents may be inspected by the defendant, its attorneys or agents at the office of Messrs. Hatch & Silliman, attorneys for plaintiff on Thursday the third day of July next between the hours of nine o'clock a. m., and four o'clock p. m., and that the defendant is hereby required within forty-eight hours from the last mentioned hour to admit the said several facts and that said document specified to be original was written, signed, or executed as it purports to have been, saving all just exceptions to the admissibility of all such facts and documents as evidence in this cause.

Dated this second day of July, 1902.

(Signed) HATCH & SILLIMAN,
Attorneys for Plaintiff.

To Messrs. Robertson & Wilder, attorneys for defendant.

41 Original.

Description of document.	Date.
1. Royal patent No. 7858 to Lot Kamehameha.....	August 28, 1890.

Facts.

1. That Lot Kamehameha (Kamehameha V) died intestate on the 11th day of December, 1872. That on September 11th, 1873, a decree was filed in the supreme court of the Hawaiian islands distributing said estate to Ruth Keelikolani as sole heir, including the property described in royal patent No. 7858.

2. That Ruth Keelikolani died on the 25th day of May, 1883, after having made and executed her last will and testament. That said will was duly admitted to probate in the supreme court of the Hawaiian islands on June 22, 1883. That in said will the property described in royal patent No. 7858 was devised to Bernice Pauahi Bishop.

3. That Bernice Pauahi Bishop died on the 16th day of October, 1884, after having made and executed her last will and testament and two codicils. That said will and codicils were duly admitted to probate in the supreme court of the Hawaiian islands on December 2, 1884. That in said will and codicils the property described in royal patent No. 7858 was devised to Samuel M. Damon, plaintiff herein.

We admit originals #1, and facts #1, 2 & 3.
July 2, 1902.
(Signed) ROBERTSON & WILDER,
Of Counsel for Defendant.

(Endorsed:) Filed July 3, 1902. (S.) George Lucas, clerk.

42 (EXHIBIT B OF BILL OF EXCEPTIONS.)

(Revenue stamp $1.00.)

No. 7858.

Royal Patent.

Upon confirmation of the land commission.

Whereas, the board of commissioners to quiet land titles have by their decision awarded unto Lota Kamehameha Kuleana Helu 7715. Apana 2. An estate of freehold less than Allodial, in and to the land hereafter described, and whereas proper application having been made to the minister of the interior for a royal patent on the within described land a certificate of boundaries defining the same having been duly filed, and whereas the government commutation thereon was relinquished by resolution of the privy council adopted August 27th A. D. 1850.

Therefore, Kalakaua, by the grace of God, King of the Hawaiian islands, by this royal patent, makes known to all men, that he has, for himself and his successors in office, this day granted and given absolutely, in fee simple, unto Lota Kamehameha all that certain piece of land situated at Kona, known as the Ahupuaa of Moanalua in the island of Oahu and described as follows:

Commencing at a point on the sea shore called "Kumumau" on the west bank of a small stream, the station being marked by coral stones buried in the sand so as to form a cross, with point thus ⏄ indicating true north, from this point the government survey station "Puuloa" bears N. 73 10′ W. true 8220 feet, the Ewa church bears N. 22 7′ W. true, Salt Lake station bears N. 39 1′ E. true and Diamond Head station bears S. 65 13′ E. true. The magnetic declination being 9 35′ east.

The boundary runs,

43 1. N. 6 00′ E. true 3510 feet along Halawa along the edge of Kalihi fish pond Lelepaua, to east angle of the fish pond Waiaho adjoining Old Salt Works.

2. N. 13 50′ W. true 3475 feet along Halawa (crossing the road from Honolulu to Puuloa) to a pile of coral stone from which Ewa church bears N. 27 36′ W. true Thence

3. N. 47 5′ E. true 12800 feet along Halawa to an iron pin on the ridge surrounding Aliamanu from which point Salt Lake station bears N. 75 54′ E. true. Thence

4. N. 34 10′ E. true 1720 feet along Halawa, and the ridge above mentioned.

5. N. 77 50′ E. true 4040 feet along Halawa bearing the ridge on the right to the ancient land mark called "Kekaananiau o Kapukaki," from which Salt Lake station bears S. 13 2′ W. true 1160 feet.

6. N. 53 45′ E. true 675 feet along Halawa to rock marked H. & M. makai of Government road.

7. N. 66 24′ E. true 11140 feet along Halawa up dividing ridge to red hill, Thence

8. N. 57 44′ E. true 14650 feet along Halawa the boundary being the water shed of the dividing ridge of the Halawa and Moanalua valleys to peak overlooking Koolau.

9. S. 61 31′ E. true 5743 feet along Heeia to the top of the ridge, being the boundary to peak called Keahiakahoe, Thence,

10. S. 14 48′ E. true 3840 feet along Kaneohe, the top of the ridge being the boundary to a ridge adjoining Kalihi valley,

11. S. 63 7′ W. true 7370 feet along the top of the dividing ridge between Kalihi valley and Moanalua along Pohakuawaawa L. C. award 6450 Apana 10 to Kaunuohua, Government land Hueu, Mahele award 56, and Kekuapalau L. C. award 6450 Ap. 9 to
44 Kaunuohua, to head of the land of Kahauiki

12. S. 86 38′ W. true 2020 feet along Kahauiki, the top of the ridge being the boundary, to place called Punakalai;

13. S. 57 25′ W. true 3460 feet along Kahauiki the top of the ridge being the boundary to place called Huluena;

14. S. 77 6′ W. true 1577 feet along Kahauiki the top of the ridge being the boundary;

15. S. 59 6′ W. true 4003 feet along Kahauiki the top of the ridge being the boundary to place on ridge called Mailehahai.

16. S. 57 35′ W. true 4751 feet along Kahauiki the top of the ridge being the boundary;

17. S. 38 15′ W. true 3828 feet along Kahauiki passing the hill Puukapu;

18. S. 1 15′ W. true 1254 feet along Kahauiki to a large rock on mauka side of Gov't road marked and called Pohakuaukai; thence

19. S. 11 5′ W. true 1168.2 feet along Kahauiki crossing Gov't road; thence

20. S. 26 15′ W. true 415.8 feet along Kahauiki to a large rock in fish pond wall marked with a cross, from which rock the Gov't survey station Hauiki bears N. 68 28′ E. true 5348 feet and Mokauea station bears N. 86 55′ E. true 8283 feet;

21. Along the fish pond walls, between the ponds of Weli and Kaihikapu to the island of Mokumoa, thence along the Weli side of the island of Mokumoa to sea wall of Weli, thence along the shore at high water mark, and along the outer walls of the fish ponds Kaihikapu, Mapunapuna, Awawaloa, and Kaloaloa to place of beginning.

22. There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows: From the point just mentioned in the sea wall of Weli, straight across the channel to
45 a point called Kaoki near the island of Mokuonini or Mokupilo, thence along edge of deep water, on right side of chan-

nel to place called Kai-iki outside of island of Mokuoeo where the sea breaks, thence to point called Pahunui at edge of deep water, thence to coral called Hanaweke on edge of deep and shallow water; thence to bunch of coral called Namahana, then to Kalamake—thence along edge of reef to Lamaina, then to Koke which is south of Ahua point, then to Kukukahi then to Auwaiomiki, then to Palani a bunch of coral which is directly south of, or makai of Kumumau, thence to initial point Kumuma'u; The direct bearing and distance from rock in wall of Weli and Kaihikapu ponds to Kumuma'u is S. 67 50′ W. true 21040 feet.

Area above low water mark 9.045 acres, exclusive of the Government ponds of Kaihikapu and Lelepaua.

The islands of Mokumoa, Mokuonini and Mokuoeo are a part of Moanalua, and are included in the above area.

Containing an area of 9.045 acres more or less: excepting and reserving to the Hawaiian government, all mineral or metallic mines of every description.

To have and to hold the above granted land in fee simple unto the said Lota Kamehameha his heirs and assigns forever, subject to the taxes to be from time to time imposed by the legislative council, equally upon all landed property held in fee simple.

In witness whereof, I have hereunto set my hand, and caused the great seal of the Hawaiian islands to be affixed, this 28th day of August, 1890.

[SEAL.] (Signed) KALAKAUA REX.

By the King:
The minister of the interior.
(Signed) C. N. SPENCER.

(Endorsed:) Plaintiff's Exhibit A Filed July 14, 1902. (S.) K. Widdifield, clerk.

46 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

SAMUEL M. DAMON
vs.
TERRITORY OF HAWAII.

JULY 14, 1902.

Mr. HATCH: I offer in evidence a notice calling upon the defendant's counsel to admit certain facts and the response of counsel. First, the original document. Description of document one, royal patent 7858 to Lot Kamehameha, dated August 28th, 1872. Facts: First, Lot Kamehameha, Kamehameha V, died intestate on the 11th day of December, 1872; then on September 11, 1873 a decree was filed in the supreme court of the Hawaiian islands, distributing said estate to Ruth Keliikolani as sole heir, including the property described in royal patent 7858.

Second. That Ruth Keliikolani died on the 25th day of May, 1883, after having made and executed her last will and testament; that said will was duly admitted to probate in the supreme court of the Hawaiian islands on June 22nd, 1883; that in said will the property described in royal patent 7858 was devised to Bernice Pauahi Bishop;

Third. That Bernice Pauahi Bishop, died on the 16th day
47 of October, 1884, after having made and executed her last will and testament and two codicils; that said will and two codicils were duly admitted to probate in the supreme court of the Hawaiian islands on December 2nd, 1884; that in said will and codicils the property described in royal patent 7858 was devised to Samuel M. Damon, the plaintiff herein.

We admit original marked "One" and facts numbers one, two and three, Robertson & Wilder, of counsel for defendant, July 2nd, 1902.

Mr. HATCH: That is an admission, gentlemen, of all which I have read.

The COURT: It may be filed.

Mr. HATCH: I offer in evidence if the court please, original royal patent 7858.

(Patent read in evidence, and marked Plaintiff's Exhibit "A.")

Direct examination of TIMOTEO HEU, called for the plaintiff and sworn:

Mr. HATCH:

Q. Where do you live, Heu?

A. I am living at Kahakaulana and now I am living mauka of that on one of the Bishop's pieces of property.

Q. How old are you Heu?

A. 70.

Q. Where were you born?

A. On Kauai.

Q. How long have you lived on the island of Oahu?

A. Quite a long while. Where I have been living and
48 fishing I have been forty years there and four years up Lahaina at school and down to Kauai, Waiohi, four years, and from Waiohi I was called up here.

Q. Do you know the Ahupuaa of Moanalua?

A. Yes sir.

Q. Has that land any sea fishery?

A. It has and it is the biggest fishery right on that side of the islands.

Q. Who is in charge of that fishery at the present time?

A. It is under Sa, Damon.

Q. And who is in actual charge of the fishery itself?

A. Heu, myself. I lease it from him for a thousand dollars a year.

Q. Do you know the boundaries of that fishery?

A. Yes sir.

Q. How long have you been familiar with this fishery belonging to the Ahupuaa of Moanalua?

A. 1862 I lived on the place, having married a woman belonging to the land Kahakaulana, and had children by her there and remained on the property ever since and I am still there. When I first lived on the place Kamehameha Fourth, called Liholiho was reigning at the time and had this property.

Q. Had this property?

A. He had the property at that time and when he died then it descended to Kamehameha Fifth, Lot Kamehameha.

Q. Kamehameha Fourth had it?

A. When I first moved there Kamehameha Fourth had it and then from Kamehameha Fourth it descended to Kamehameha Fifth or Lot Kamehameha.

Q. And do you know when that was?

A. That was in the year 1862 when I first moved down there.

49 He was the owner of the property; he was still alive at that time

Q. What sort of authority did he exercise over this fishery?

A. He held control of the property and the natives that were living under him went fishing, permitted by him to go fishing on the division plan. If they would catch the fish they would sell the fish and divide the money, a portion to the King and a portion to themselves. At times they would catch fish but didn't sell it at all but would take all the fish to the King.

Q. This is Kamehameha Fourth that you are speaking about?

A. The same with Kamehameha Fifth, in either case. The last is Sam Damon, divisions are different; the manner——

Q. During Kamehameha Fourth's life was this fishery ever thrown open to the public?

A. No.

Q. Were people from any other land except Moanalua allowed to fish there?

A. No.

Q. What claim did Kamehameha Fourth make to the fishery of Moanalua?

A. The mullet was especially claimed by the King and everybody was debarred from taking that fish. The other fish that ran in the waters of Moanalua were free to the people that belonged to the land and no other—no one from Honolulu or any other part of the islands.

Q. How did Kamehameha Fourth enforce that claim of his?

A. He enforced it by having the people under him to carry out his will in the matter.

Q. State whether or not anybody was appointed especially to look after this fishery.

50 A. Yes sir, a person by the name of Kilinaihe who was a kahu of the King's was delegated and had power to attend to the affairs of Moanalua, fishery and all.

Q. What acts were done to show the fact that the King claimed

this as his fishery and that the public were not allowed to fish on it?

A. Because it was all understood that Kamehameha Fourth, being the chief, was the owner and possessor of the sea right and everybody respected it and it was so in case of Kamehameha Fifth, when he ascended that same right was understood by all the people of the country.

Q. Were any marks put up at any time, stakes or anything?

A. There were certain marks planted all around the sea fishery and it was done during the month of January on the night of Kane and it was as I say, planted all around and everybody was tabooed from interfering with the sea. And when these marks were planted around the sea fishery the people of the land even were forbidden from going and fishing during those three months of the taboo.

Q. Under whose direction was this taboo enforced?

A. Under the direction of Klinaihe the King's man, this taboo was placed, an embargo on it to prevent the fish from all being taken away, that is to give them a chance to grow.

Q. How long did that course continue?

A. That process was carried out during Kamehameha Fourth's reign and also during Kamehameha Fifth's reign, every year. Every year that process of putting a taboo for three months on the sea fishery to give the spawn an opportunity to grow without being cleaned out as they do now-a-days was carried on during Kamehameha Fourth's time and also during Kamehameha Fifth's time.

51 Q. Now under Kamehameha Fifth was there any claim of ownership to that fishery?

A. He came into possession of the inheritance and continued the right under him, received as King and as sovereign and the taboos were put on by him under the direction of his man, this Kilinaihe.

Q. And how long did that continue?

A. It began with the death of his brother, his predecessor, until his death and successor. Those were rights continued from one King to the other and only ceased under the charge of ownership.

Q. Well, did Kamehameha Fifth own this land of Moanalua, the land?

A. It was there and when Kamehameha Fourth died, Liholiho, he succeeded in inheriting all that Kamehameha Fifth possessed, that is all the lands, and Kilinaihe was the luna of the land under Kamehameha Fourth but Kaleilikeole succeeded him: that was his cover.

Q. How was King Kamehameha Fifth—in what capacity was he acting in regard to this fishery; whether it was owner of the lands or as King?

A. He exercised the right as Lot Kamehameha, not as the sovereign but as the prince, the subject, and the one preceded him exercised the same right, and when he inherited his right he continued to exercise it until Pauahi Bishop got possession of the land.

Q. Was that as owners of the Ahupuaa of Moanalua?

A. In both capacities. Not only as owner but also as the sovereign.

Q. After Lot Kamehameha died, that is Kamehameha Fifth, who did this fishery go to and the land of Moanalua?

52 A. It descended to Keliikolani, and when Kaleilikeole died Simon Kaai became luna.

Q. What did Keliikolani have possession of down there?

A. The whole Ahupuaa, land and sea.

Q. Who did she put in charge of the fishery?

A. She established me there in charge of the fishery. Simon Kaai was Keliikolani's agent in charge of the property and I was placed in charge there of the sea fishery.

Q. What year were you placed in charge of the sea fishery?

A. I think I was put — the same year that Keliikolani died, in 1883.

Q. And after her death who continued you in charge down to the present time?

A. Simon Kaai continued me in charge of the place.

Q. Who was the owner of the land and fishery after Keliikolani's death?

A. Pauahi.

Q. And what sort of claim did she make to this fishery?

A. The same right that passed from one King to the other and from them to Ruth Keliikolani, and from her to her cousin Mrs. Bishop, they being from the descendants of the chief and stood in the line of succession to this land.

Q. And did Keliikolani and Mrs. Bishop make the same claim that Kamehameha Fourth and Kamehameha Fifth did to this fishery?

A. Yes, just the same as the two sovereigns owned and possessed the land, so did the ladies after them.

Q. What did they do in regard to this fishery to show their ownership?

A. In the case of Mrs. Pauahi Bishop I have heard that possession was handed over to Mr. Damon. Whether it was by a deed or by oral—or in an oral manner or whether by sale or what it was,

53 you ought to be better posted on that than myself.

Q. What I want to know is what Mrs. Bishop did in regard to the people at large, the general public, going on that fishery.

A. She showed her ownership as the lord of the sea and land by appointing Mr. Damon or giving him the property and setting him in possession over the land and fishery.

Q. Were the public allowed to fish on that during her lifetime?

A. No one from outside the Ahupuaa.

Q. Have the public been allowed to fish on that fishery at any time down to the present time?

A. The same old established custom has been continued up to the present time, that is even now. That is, the people of the land were allowed to go and do their fishing, reserving—excepting the special fish that had been distributed for the owner of the land, that is the mullet, and they are allowed to go there and fish and they only.

People on the outside never have been allowed to go there and fish I have been sixteen years under this foreigner, Sam Damon, paying him one thousand three hundred dollars the year for the right, the fishing right, and the same prohibition exists now as it did then, no one from the outside is allowed to go there and exercise any rights except those belonging to the land and according to their rights, and my master, the one that is over me, Mr. Damon, had told me last June, told me " We have one year more and then our rights will be abolished. We have no more rights, and then they will be taken away the coming June," that is what he told me, he seemed to foresee that there was some change to take place, perhaps that may be taken place, perhaps not, I don't know.

54 Cross-examination of TIMOTEO HEU.

Mr. ROBERTSON:

Q. This fishery at Moanalua extends from the beach out to the reef, don't it?

A. From the reef where the sea breaks right onto the main land, all that water in between that and the main land where the grass commences to grow, right parallel and mauka of the railroad track at the present time belongs to the sea fishery.

Q. By that, where the grass begins to grow you mean the beach, don't you?

A. The kumu mau I have reference to is that kumu mau where the boundary at Kaleikau is that which separates the Moanalua boundary from the adjoining land, on the Ewa side, and from there runs out to sea, eastward to the reef, following the reef until it reaches this boundary of Kalihi, then running inland.

Q. Then it extends along the entire frontage of the Ahupuaa, the sea frontage, does it?

A. Yes sir.

Q. Has the mullet always been the taboo fish in that fishery?

A. Yes sir, the anae is the taboo fish.

Q. And it is the right to the taboo fish that you leased from the owner of the land?

A. Yes sir. If the stragglers besides the mullet happens to get into my net, why it is mine.

Q. And during all this time the tenants on the Ahupuaa have had and exercised their rights in the fishery, have they?

55 A. Yes sir.

Q. The rights of a tenant being to take fish other than the mullet?

A. Yes sir they have done that and do take it now and eat it and sell it, barring to people that don't belong on the land, that are outside of it; altogether they have no right to come in whatever to take fish, eat or sell it.

Plaintiff rests.

Mr. ROBERTSON: I would like to move that the plaintiffs be nonsuited. In the first place I contend, if the court please, that this

deed did not convey to the patentee a fee simple or any title to the fishery. The language of the deed, the granting clause (reads): "There is also attached to this land a fishing right." In other words, in regard to the fishery there is no grant. The patent simply grants the land which is described by metes and bounds and the area being stated. I submit that when the patent says, "There is also attached to this land a fishing right in the sea," there are no operative words of grant to the fishing right. A part of the Ahupuaa would not pass without an express grant of it. The land commission had a right by statute to convey a fishing right and there being no award in evidence we do not have to go behind the patent itself, which shows no grant of a fee simple title to this fishery.

The foregoing is a full & true copy of my shorthand notes taken in the above entitled cause.

(Signed) J. W. JONES,
Stenographer Cir. C., 1st Cir.

56 The foregoing transcript of evidence in the case of S. M. Damon *vs.* The Territory of Hawaii, being certified as correct by the official stenographer of the court, may be filed as a part of the record in said cause as fully to all intents and purposes as if the same were set out *in hæc verbae* in the bill of exceptions herein.

(Signed) A. S. HUMPHREYS,
First Judge.

July 28", 1902.

(Endorsed:) Received $25. Filed Jul- 17 1902 (S.) J. A. Thompson clerk.

57 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

SAMUEL M. DAMON
v.
THE TERRITORY OF HAWAII. } Request for a Substitute Justice.

To Hon. J. T. De Bolt:

Mr. Chief Justice Frear and Associate Justice Perry being disqualified to sit in the above entitled cause, I the remaining justice of the supreme court, hereby request and authorize you to sit with me and hear and determine the said cause.

Dated the 6th day of October 1902.

(Signed) C. A. GALBRAITH.

Attest:

(Signed) GEORGE LUCAS, *Clerk.*

(Endorsed:) Filed October 6, 1902. (S.) George Lucas clerk.

58 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

SAMUEL M. DAMON
v.
THE TERRITORY OF HAWAII. } Request for a Substitute Justice.

To Hon. W. J. Robinson:

Mr. Chief Justice Frear and Associate Justice Perry being disqualified to sit in the above entitled cause, I the remaining justice of the supreme court, hereby request and authorize you to sit with me and hear and determine the said cause.

Dated the 6th day of October 1902.

(Signed) C. A. GALBRAITH.

Attest:

(Signed) GEORGE LUCAS, *Clerk.*

(Endorsed:) Filed October 6, 1902. (S.) George Lucas clerk.

59 Supreme Court of the Territory of Hawaii, October Term, 1902.

SAMUEL M. DAMON
v.
THE TERRITORY OF HAWAII.

HONOLULU, MONDAY, *October 6th*, 1902.

Clerk's Minutes.

Action to establish fishing rights.

Before Galbraith, J., Circuit Judge De Bolt and Circuit Judge Gear.

Hatch and Silliman appeared for the plaintiff and Robertson and Wilder for the defendant.

Mr. Robertson moves orally that the cases of Samuel M. Damon *v.* The Territory of Hawaii, and J. O. Carter *et al.*, trustees *v.* The Territory of Hawaii be advanced on the calendar, and both cases be heard together

Mr. Hatch offers no objections

The court grants the motion

Mr. Hatch reads bill of exceptions and argues

Judge Gear states that he is of the opinion that under the organic act providing that the supreme court shall consist of three justices, and further providing that in the case of the disqualification of any justice his place shall be filled as provided by law, where two justices are disqualified the remaining justice is not authorized to fill the vacancies by appointing two others not justices of the supreme court, and declines to sit.

60 Upon Judge Gear retiring from the bench, Justice Galbraith requested and authorized Judge Robinson to sit with him and hear and determine said cause

At the conclusion of Mr. Hatch's argument, Mr. Magoon asks permission to argue

Justice Galbraith states that the court has decided that any attorneys who have cases involving the same questions may argue if they wish

Mr. Magoon argues

Mr. Stanley is granted leave to file a brief

At 4.15 p. m., the court adjourns for the day.

TUESDAY, *October 7th*, 1902.

Kinney Ballou & McClanahan and Smith and Lewis are allowed to file briefs

Mr. Robertson argues

Mr. Hatch replies

At 12 m., a recess is taken till 1.30 p. m.

At 1.35 p. m. Mr. Hatch continues with his argument.

Mr. Stanley argues

Mr. Magoon replies

Mr. Robertson replies

The court takes the matter under consideration

(Signed) GEORGE LUCAS, *Clerk.*

61 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased,

v.

THE TERRITORY OF HAWAII.

SAMUEL M. DAMON

v.

THE TERRITORY OF HAWAII.

Exceptions from Circuit Court, First Circuit.

Submitted October 7, 1902; decided November 15, 1902.

Galbraith, J., J. T. De Bolt, circuit judge, in place of Frear, C. J., disqualified, and W. J. Robinson, circuit judge, in place of Perry, J. disqualified.

The Hawaiian statutes giving konohikis or landlords special privileges in the sea fisheries adjoining their land were not grants of property or covenants in the nature of grants but were public statutes in which no one could acquire a vested right. The phrase "private property" used in these statutes denoted no more than the special rights or privileges given by the law over the sea fishery.

When the statutes were repealed by the organic act the konohiki or landlord no longer had any "private property" in such fishery.

Exclusive rights in a sea fishery surrounding these islands could not be acquired by prescription or ancient custom.

62

The konohiki's or landlord's "private property" in the sea fishery could not pass as an appurtenance to the land.

A royal patent containing, after the description of the land conveyed and before the habendum clause, a recital that "there is also attached to this land a fishery right in the sea adjoining" without express words of grant referring to the fishery does not convey any right in the fishery.

Opinion of the court by GALBRAITH, *J.*:

The plaintiffs commenced these actions under section 96 of the organic act for the purpose of establishing an exclusive right to the fisheries of Waialae-iki and Moanalua, island of Oahu.

In the first case the plaintiffs, as trustees of the Bishop estate, claim a vested right as sole and exclusive owners in fee simple of the sea fishery, same not being a pond or artificial enclosure, situated within the reef adjoining the land of Waialae-iki, setting out a description by metes and bounds; and further allege in their petition that plaintiffs' claim consists of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds described, one species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit, upon consultation with the tenants of their land, all fishing within such fishery during certain months of the year; and during the fishing season to exact from each fisherman one third of all the fish taken
63 upon said fishing ground; that from time immemorial the plaintiffs and their grantors by ancient custom and prescription have had an exclusive fishery within the bounds set out, subject only to the rights * * * of tenants on the land of Waialae-iki; that the said fishery was originally appurtenant to the land of Waialae-iki awarded to A. Paki by Apana 3 of land commission award No. 10613 and confirmed by royal patent No. 3578; and that plaintiffs claim an absolute estate in fee simple in said fishery by purchase under various mesne conveyances.

In the second case the plaintiff makes a similar claim to the fishery situated at Moanalua and sets up an additional ground for the claim of rights, *i. e.*, that the said fishery was confirmed to L. Kamehameha by royal patent No. 7858 under whom the plaintiff claims an absolute estate in fee simple in said fishery by purchase by various mesne conveyances, devise and descent.

The cases were tried to a jury in the circuit court. In the first the judge granted defendant's motion for non-suit at the close of plaintiffs' evidence. In the second a verdict was directed for the

defendant. The plaintiffs excepted and come to this court on bills of exceptions. The cases were argued and submitted together.

In the first case the claim of plaintiffs is based on three grounds, to wit; (1) that the right claimed is an appurtenance to their land; (2) that it is based on prescription or (3) on ancient Hawaiian custom while in the second case these three grounds are relied on and an additional claim for the right is made *i. e.*, a grant from the King.

It is contended on behalf of the Territory, and the ruling of the circuit judge seems to have been based on this theory, that in the second case the patent for the land of Moanalua does not grant the fishery to the patentee and in both cases that the plaintiffs did not
and could not acquire an exclusive right in the fisheries by
64 prescription or by ancient custom, and that whatever right
they enjoyed in the fisheries on June 14th, 1900, the time of taking effect of the organic act, was derived from the Hawaiian statutes on the subject of fisheries and that these were public statutes or laws under which no one could acquire a vested right and that when the statutes were repealed all of the rights and privileges of the plaintiffs in the said fisheries were abrogated and annulled.

The provisions of the organic act on the subject are as follows,

"SECTION 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights: but no such vested rights shall be valid after three years from the taking effect of this act unless established as hereinafter provided."

SECTION 96. "That any person who claims a private right to any fishery shall, within two years after the taking effect of this act, file his petition in a circuit court of the Territory of Hawaii setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established, the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

The question of greatest difficulty presented by these cases
65 is to determine whether or not the rights of the plaintiffs in
the respective fisheries were properly "vested rights" within the saving clause of section 95, of the organic act.

By the common law the title and dominion of the sea and navigable rivers and arms of the sea within the territorial jurisdiction were in the King who held the same in trust for his subjects who

had a common right of navigation and fishery therein. This jurisdiction was held to extend one marine league from the beach at low water mark. 2 *Blackstone* 52; *Gould* on Waters sec. 3. *Rogers vs. Jones*, 1 Wend. 237 at 256; *Shively v. Bowlby*, 152 U. S. I. The *King v. Parish*, 1 Haw. 58.

Although the claim to an exclusive right in a sea fishery has been the subject of much litigation and of conflicting decision the weight of authority seems to hold that at common law such a right might be acquired by grant or by prescription which presumes a grant. Gould on Waters sec. 189 and cases cited in note: *Rogers v. Jones, supra:*

The supreme court of New York has held that by the common law the King had the right to grant the soil under navigable water, and with it the exclusive right of fishery. *Brookhaven v. Strong*, 60 N. Y. 56. A grant made by a colonial governor and confirmed by act of assembly was held to vest the title to an exclusive fishery in the grantee. Robins *v.* Acherly, 91 N. Y. 98; the holding of the New York courts on this question was followed by the Supreme Court of the United States in Lowndes *v.* Huntington, 153 U. S. 1.

It is said by Woodworth, J., in case of Rogers *v.* Jones, *supra*, "It is well known, that numerous grants have been made from time to time by the commissioners of the land office of lands under the waters of the Hudson, all of which have proceeded on the ground that it was the undeniable right of the people of this State to make such grants. Until very lately, I have not understood that
66 the power was questioned. It is here proper to observe that this principle does not at all conflict with the doctrine laid down by writers on national law, who declare the air, running water, the sea, etc., are common property (Vattel, B. 1. ch. 23, sec. 280, 287. Grotius, B. 2 ch. — sec. 3). The same writers, however, admit that the various uses of the sea near its coast render it very susceptible of property; and rivers are susceptible of property, because confined in banks; such places may be appropriated by the people to whom they belong and the productions within reach, in the same manner as the land they inhabit." P. 156.

Kamehameha III, who ruled the Hawaiian islands before there *was* any written laws or constitution, as well as after the adoption of a written constitution was in the fullness of the common law phrase "the universal lord and original proprietor of all lands in his kingdom." He was the source of title. He could give and take from. His will was law and none of his subjects held allodial titles prior to 1840. There is little, if any, doubt that he had the power to grant exclusive fisheries to any of his subjects if he desired to do so.

(Territory *v.* Liliuokalani, *ante* 88.

Brown *v.* Spreckels, *ante*, 400,) although there is a declaration by Chief Justice Judd that tends strongly to indicate that this court at time (1899) held to the contrary view. "The people of Hawaii" said the Chief Justice, "hold the absolute rights to all its navigable waters and the soil under them for their own common use. See Martin *v.* Waddell, 14 Pet. 410. The lands under navigable waters

in and around the territory of the Hawaiian government are held in trust for the public use of navigation. Stockton *v.* Baltimore & N. Y. R. R. 32 F. 9." *King v. Oahu Railway & Land Co.* 11 Haw. 725.

Admitting that the plaintiffs might have obtained the right claimed by grant the question arises. Did they acquire such right?

67 Such a grant would be against the public and under the well established rule of construction requiring all such grants to be construed most strongly against the grantee it follows that such right if it exists must appear by express terms of the grant.

Much was said at the hearing and in the briefs relative to these island- surrounded by the sea, teeming with food for the inhabitants, and of the relative importance of the products of the sea to the life of the people over those of the land. All this was and is of much interest but it does not appear how it in any material way leads to a solution of the issues presented. Since it appears that whatever the customs may have been or the rights and privileges enjoyed by the chiefs, nobles and common people in the fisheries prior to the year 1839, at that time they were all revoked and cancelled, and a statute passed to regulate and govern them.

The first written law on the subject of fisheries in these islands was adopted by the King, nobles and chiefs on the 7th day of June 1839, In this statute it is declared that,

"His Majesty the King hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords, and a portion he reserves to himself." And further that,

"These are the fishing grounds which His Majesty the King takes and gives to the people: The fishing grounds without the coral reef viz.: the Kilohee grounds, the Lohee grounds, the Malolo grounds together with ocean beyond.

"But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands but not for others."

An examination of this act (chap. III, Laws of 1839) will show that it was intended to govern the subject of fisheries completely. Experience demonstrated that it was incomplete and

68 various amendments were adopted on April 1st, 1841. Again in 1845 another act was passed on the subject more clearly defining the rights of the several parties. Section 1 of this act defines the fishing ground of the people to be "the entire marine space without and seaward of the reef upon the coast of the several islands," etc. Section II of this act reads, "The fishing grounds from the reefs, and where there happens to be no reefs from the distance of one geographical mile seaward to the beach at low water mark, shall in like manner be considered private property of the landlord whose lands by ancient regulation belong to the same; in the possession of which private fisheries the said landlords shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth.

"SEC. III. The landlord shall be considered in like manner to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed."

The other sections give the landlords the right each year to set apart for themselves one specie or variety of fish natural to the fishery and to give public notice of this fact by proclamation etc., and fixing penalties against landlord and tenant for violation of the act. Also defines the species of fish designated as the royal fish and that these shall appertain to the government and for a division of these between the King and the fishermen, and extensive provisions relative to the "King's tabu" etc.; providing for the appointment of fishery agents to "exact and receive of all fisherman for the use of the royal exchequer during the legalized fishing seasons the one-half part or portion of all protected fish taken without the reefs," etc.

Time and experience demonstrated to the satisfaction of the King that it was not profitable for the government to engage in
69 the fishing business so on July 11, 1857, the King approved an act granting to the people the rights of piscary belonging to the government. The second section of this act reads:

SEC. 2. "All fishing grounds pertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds the minister of the interior may tabu the taking of fish thereon at certain seasons of the year."

Another act the same year (1851) was passed entitled "An act to protect the people in certain fishing grounds," and reads in part as follows:

"SECTION 1. That no person who has bought or who may hereafter buy any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom over any fishing grounds not included in his title, although adjacent to said land. The fish in said fishing grounds shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior.

"SECTION 2. If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been or may be given to the people, such fish shall not be tabooed then. It shall only be tabooed when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other."

The Civil Code of 1859 embraced all the laws then in force in the islands on the subject of fisheries. Section 384 of the Civil Code is a verbatim copy of sec. 2 of the act of 1851 above quoted and sec. 387 is a copy of sec. II of the act of 1845 except the word "kono-
70 hiki" is substituted for the word "landlord" used in the original enactment. The other sections hereinbefore quoted were

included in this chapter of the Civil Code. All of these laws without material change were carried forward and are published as chapter 84 of the Penal Laws of 1897. These statutes on the subject of fisheries have been in force some of them for more than half a century and all of them for most of that time, until repealed by sec. 95 of the organic act, June 14, 1900.

It seems clear from a review of these statutes that the following inferences are irresistible, to wit, that the plaintiffs cannot base any claim to the fisheries on ancient custom or prescription; that no right that they may have possessed can antedate the act of 1839; that all right in the fisheries of whatever nature that had been enjoyed by any subject prior to that date was revoked and annulled by said act and that all claims must now date from the act of 1839 or from some subsequent date.

There are only two grounds remaining on which the plaintiff might sustain their claim, to wit: (1) that it is based on grant or (2) was an appurtenance to the land.

It is argued that these statutes are in the nature of grants and are sufficient to vest title to the fisheries in the landlords and that the word "give" used in the act of 1839, is a word of conveyance and was sufficient to pass title to the fisheries from the King to the konohiki and that the title so conveyed become a vested right within the meaning and intent of sec. 95 of the organic act.

We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes themselves bear conclusive evidence that they were not intended as grants of property and that they were not intended to be more than appears from their plain terms, to wit, grants of special privileges to persons who then were or might become landlords.

71 The statute of 1851 granting to the people certain rights of piscary shows a clear intent to make a grant both in the title and body of the law. Words of grant are used. "All fishing grounds," etc., "shall be and are hereby forever granted." If it had been the intention to convey an absolute right of property to the landlords by the other statutes, it seems that suitable words of grant would have been employed. That such words were not used can only be explained on the theory that a grant was not intended, and we so construe the statutes.

It is contended that the fishery was an appurtenance to the land and passed by deed or patent without special reference thereto in the conveyance.

The statute declares the fisheries within the reefs and for one mile from shore where there is no reef to be the "private property" of the konohiki or landlord. We understand the word *property* to be used in this statute in a general sense meaning dominion over a thing. (1 Blackstone, 122; 2 *id.* 1.) "The word 'property' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, means only the *rights* of the owner in relation to it. It denotes a right over a determining thing." Andrew's Am. Law, sec. 96.

The phrase 'private property' used in the law cannot mean more than the rights which the statute gave to the konohiki or landlord over the fishery and such private property could not be said to be held by contract or any covenant in the nature of a contract.

A parallel is sought to be drawn between the fishery statutes and the United States Statutes permitting settlers to take up homes on the public domain. The analogy is not apparent. There is a wide distinction between the statutes and the rights that may be acquired under them. The United States homestead statute is
72 not self-executing nor is it a grant of land to the homesteader. It provides a method by which a qualified person who complies with the terms prescribed may acquire title to land. The title passes from the Government to the homesteader when the patent issues and not before. *Shiver v. The United States*, 159 U. S. 491. Again the one statute relates to land that may be possessed, occupied, cultivated and improved with buildings and structures while the other relates to water, not water passing with the soil under it or confined within bounds but water in the open sea, changing with the rising and ebbing of the tide; it gave no right to the land under the water or to place any structure or improvement thereon not even to anchor a house-boat but a right to take fish from this area of water if caught while there, a mere theoretical species of property at best.

If the "private property" possessed by the konohiki in the fishery was only the right given by the statute then it follows that when the statute was repealed there was no further claim of "private property" in the fishery, because that which gave the right or "private property" was no longer in existence. In this view and, we take it to be the correct view, the plaintiffs could acquire no vested right in the fishery. While the statutes were in force plaintiffs' private property in the fishery was protected but when they were repealed there was no property in the *res*. These statutes were general laws. "Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by change in the law." Cooley, Const. Lim., p. 343.

Again the same author says:

"In organized society every man holds all he possesses and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of
73 public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense." Cooley, p. 437. * * *

"All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they became vested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." *Id.* p. 438.

This view is in perfect harmony with the contemporaneous construction placed on these statutes in the leading case on the subject in this court, *Haalelea v. Montgomery*, 2 Haw. 62. In this case Mr. Justice Robertson said that the landlord "could have transferred the fishery, or her right therein, only by an express grant, *eo nomine*. Had she made a deed of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee." P. 70.

* * * * * * *

And again, "If any person who has acquired a kuleana on the Ahupuaa of Honouliuli should sell and convey his land, or even a part of it to another, a common right of piscary would pass to the grantee as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance, it would pass as an incident. Here, we think,
74 is the great distinction between the rights of the konohiki and those of the tenants or occupants, for while the former holds the fishery as his private property the latter has only a right of piscary therein as an incident of his tenancy." *Id.* p. 71. Here it is declared that the konohiki's or landlord's rights in the fishery are private property and as such could not pass as an appurtenance to the land; that in order to convey it specific words of grant must be used in the conveyance for that purpose. This decision was rendered in 1858, one year before the adoption of the Civil Code and its correctness, so far as we are advised, is now questioned for the first time. It is contended that this part of the decision is mere dicta and was not involved in a decision of the issues in that case. Even if this be true it does not appear how that fact would weaken the declaration as a correct interpretation of the theory of the law on which fishery rights in these islands are based. The decision was by Mr. Justice Robertson whom the late Chief Justice Judd declared to be "our best authority" on early Hawaiian tradition, history and jurisprudence. It appears to have been accepted by the bench and bar of the islands as a correct declaration of law of the question for most half a century and no sufficient reason has been advanced to warrant us in questioning its correctness at this time.

The construction of the statute is further supported by the *the* fact that the land commission although given authority to award "rights of piscary" by the statute creating it, (Statute Laws, vols. I and II, sec. 7, p. 109), refused to award fisheries either as "rights or territory," except in a very few instances, leaving the parties to their rights under the general statutes." *Akeni v. Wong Ka Mau*, 5 Haw. 91. It is also confirmed by the language found in the first section of the act of May 24, 1851, passed to protect the people in certain

fishing grounds forbidding anyone who had acquired gov-
75 ernment land from exercising exclusive rights "over any fishing ground *not included in his title*, although adjacent to said lands." This inhibition was carried forward into the Civil Code of 1859 as sec. 393, and into the Penal Laws of 1897 as sec. 1458.

We do not understand that any of the adjudicated cases in this jurisdiction are opposed to this theory.

It was held that the konohiki or landlord had no power to alienate a single right given by law to the tenant in a sea fishery. *Oni v. Meek*, 2 Haw. 87.

Also that although the land commission heard evidence relative to the boundaries of the fisheries claimed by the konohiki and refused to award the fishery either as a right or territory and although the konohiki of the adjoining land was present at the hearing still he was not estopped from disputing the boundary of the sea fishery claimed to be shown by such evidence. *Akeni v. Wong Ka Mau* 5 Haw. 91.

While in *Shipman v. Nawahi*, 5 Haw. 571, the fishery is spoken of as "adjoining and appurtenant to plaintiff's land called Waiakea," the action was for damages for trespass upon the fishery. Judgment was for the plaintiff in the court below, but on appeal it appeared that the defendant had a kuleana in the land of Waiakea hence a right to fish and a new trial was ordered.

The case of *Judd v. Kuanalewa*, 6 Haw. 329, was an action of ejectment by one landlord against another for possession of a fishery. It was found that there had been a division of the fishery by the parties and judgment was rendered accordingly.

Hatton v. Piopio, 6 Haw. 334, was an action against a tenant for unlawfully catching and selling fish, it was held that "under our fishing laws every resident on a land has the right to fish in the sea appurtenant to the land and to sell the fish caught by him."

76 *Shipman v. Com'rs of Crown Lands*, 6 Haw. 351, was a suit in equity by the plaintiff's lessees of a sea fishery seeking an injunction to restrain the defendant from trespassing and fishing. It was held that no irreparable damage was shown and that there was an adequate remedy at law both by an action of damages and also under the statute by criminal proceedings. Injunction refused.

These we understand to be the principal decisions of this court construing the fishing statutes. While in some of them the fishery is spoken of as being "appurtenant to the land" and as "an appurtenant of the land" still in no one of them does the court in the slightest degree detract from the force of the law announced in Haalelea *v.* Montgomery or attempt to overrule the law there declared that a sea fishery could not pass as an appurtenance to the land. As a matter of fact the fishing rights were appurtenant to the land so long as the statutes were in force but when the statutes were repealed these appurtenances were such no longer.

"Fish in the open sea are animals *feræ naturæ*, and go and come at will unrestrained." (Hatton *v.* Piopio, 6 Haw., 337) but when

taken fish were private property and entitled to the protection of the law. It was entirely proper for the legislature to prescribe penalties for violation of the fishing statute and for the courts to entertain civil actions for damages for trespassing against the rights given by statute.

In the second case the claim of grant is based upon a clause in the patent for the land of Moanalua. It appears in the patent after the operating words of grant and the description of the land conveyed that there is a recital relative to the fishery as follows, to wit: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows." Then a description of the fishery claimed in the petition is set out by metes and bounds. The habendum clause of the patent reads in part "To have and to
77 hold the above granted land, in fee simple, unto the said Lot Kamehameha," etc. The patent was a grant of land. The operating words of grant are not enlarged by the habendum clause. The fishing right was not land or a necessary part thereof. The word "attached" cannot be construed as a word of grant or as showing an intention to convey. It does not appear from the patent that it was the intention of the grantor to convey the fishery. The recital relative to the fishery may have been inserted for the purpose of making plain the boundaries of the fishery adjoining the land and in which the statute gave the landlord special privileges. The plaintiffs, it seems, took this view of the matter as the evidence shows that he exercised the right in the fishery under the statute.

Under the common law the right of fishing in the open sea like that of navigation was a public right. The grant of an exclusive right to a sea fishery cannot be presumed. Every presumption is against the grant and in favor of the public. Every ambiguity or doubt in the instrument by which the right is claimed to be granted will be construed most strongly against the grantee.

Rapid Transit Co. v. Tram. Co., 13 Haw. 363, 371; *Charles River Bridge v. Warren Bridge*, 11 Peter 420; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Newton v. Commissioners*, 100 U. S. 548. *Shivley v. Bowlby*, 152 U. S. 1.

Applying this well established rule of construction to the facts, we are bound to hold that the patent to the land of Moanalua did not grant the sea fishery adjoining.

Exceptions are overruled.

(Signed) C. A. GALBRAITH.
(Signed) J. T. DE BOLT.
(Signed) W. J. ROBINSON.

Hatch & Silliman for the plaintiff.
Cecil Brown and Magoon & Peters on brief.
Robertson & Wilder for defendant.

(Endorsed:) Filed Nov. 15, 1902. (S.) George Lucas clerk.

78 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

SAMUEL M. DAMON, Plaintiff,
vs.
TERRITORY OF HAWAII, Defendant.
} Action to Establish Fishing Right.

Judgment.

This cause came on to be heard at the October term, 1902, of this court before the Honorable C. A. Galbraith, associate justice of this court, and the Honorable John T. De Bolt, first judge of the circuit court for the first circuit, sitting in the place of the Honorable W. F. Frear, chief justice of this court, disqualified by interest, and the Honorable W. J. Robinson, third judge of the circuit court for the first circuit, sitting in the place of the Honorable Antonio Perry, associate justice of this court, disqualified by interest, on the plaintiff's bill of exceptions to rulings of the circuit judge presiding at the special July term, 1902, of the circuit court for the first judicial circuit, Territory of Hawaii, and was argued by counsel for plaintiff and defendant.

It is considered by the court and it is now ordered and adjudged that the decision of said presiding circuit judge granting a non-suit in said cause be and the same is hereby confirmed and the exceptions taken by the plaintiff as set out in said bill of exceptions are disallowed with costs.

By the court.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

(Endorsed:) Filed Dec. 1, 1902 (S.) George Lucas clerk

79 In the Supreme Court of the Territory of Hawaii.

Before the Honorable Clinton A. Galbraith, presiding justice of said supreme court.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant.
} Action to Establish Fishing Right.

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable Clinton A. Galbraith, presiding justice of the supreme court of the Territory of Hawaii:

Your petitioner Samuel M. Damon of Honolulu, Territory of Hawaii, plaintiff in the above entitled cause, respectfully represents and shows:

1. That on the 1st day of December, A. D. 1902, judgment in the above entitled cause was entered by the supreme court of the Ter-

ritory of Hawaii in favor of the above named defendant The Territory of Hawaii and against your petitioner Samuel M. Damon, adjudging that your petitioner Samuel M. Damon had not the right to maintain an action to establish a fishing right in certain waters adjacent and claimed as appurtenant to a tract of land known as the Ahupuaa of Moanalua the property of your petitioner, situated in the district of Kona, island of Oahu, Territory of Hawaii, and that said petitioner Samuel M. Damon had not a vested right in said fishery.

80 2. That said judgment rendered by the said supreme court of the Territory of Hawaii was rendered by the highest court in which a decision could be had in said Territory of Hawaii.

3. That said judgment of said supreme court of said Territory of Hawaii was a final judgment in said cause.

4. That there was drawn in question on the hearing of said cause in the said supreme court of the Territory of Hawaii the construction of a certain act of Congress, namely, an act entitled: "An act to provide a government for the Territory of Hawaii," approved April 30th, A. D. 1900, being chapter 339, volume 31, Statutes at Large, page 141; that said act was construed by said supreme court of the Territory of Hawaii in rendering its said judgment in said cause; and that the said judgment of said supreme court of the Territory of Hawaii given upon its construction of said statute was against a title, right, privilege or immunity specially set out and claimed by your petitioner under and by virtue of said statute.

5. That there was drawn in question upon the hearing of said cause by said supreme court of the Territory of Hawaii the validity of section 95 of said act entitled, "An act to provide a government for the Territory of Hawaii," and the decision rendered therein by said supreme court of the Territory of Hawaii was against the validity of a vested right in a sea fishery claimed by your petitioner under and by virtue of said section of said act entitled "An act to provide a government for the Territory of Hawaii."

6. That there was drawn in question upon the hearing of said cause in said supreme court of the Territory of Hawaii, a title, right,

81 privilege or immunity claimed by your petitioner under and by virtue of section 95 of said act entitled, "An act to provide a government for the Territory of Hawaii," to wit, a title, right, privilege or immunity in and to a sea fishery appurtenant to certain lands the property of the plaintiff called the Ahupuaa of Moanalua, situated in the district of Kona, island of Oahu, Territory of Hawaii, claimed by your petitioner under and by virtue of section 95 of said act entitled "An act to provide a government for the Territory of Hawaii," and the decision of said supreme court of the Territory of Hawaii in said cause was against the right, title, privilege or immunity claimed by your petitioner as aforesaid.

7. That the value of the title, right, privilege or immunity claimed by the plaintiff in said action, to wit, the value of said sea fishery is over and above the sum of $5,000.00 as appears by the affidavit of Samuel M. Damon filed herewith and made a part hereof.

8. That the decision and judgment of said supreme court of the

Territory of Hawaii, which said court is and was the highest court in which a decision could be had in said cause in said Territory of Hawaii, was adverse to your petitioner and to the right, title, privilege and immunity specially set out and claimed by your petitioner; all of which appears in the record of said cause and all of which is set out as error in the assignment of errors herewith presented.

Wherefore and because your petitioner is aggrieved by said judgment he prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the supreme court of the Territory of Hawaii for the correction of the error complained of and that a transcript of the record, proceedings and papers in
82 said cause duly authenticated may be sent up to the said Supreme Court of the United States.

Honolulu, January 13th A. D. 1903.

HATCH & SILLIMAN,
Counsel for Plaintiff in Error.

(Endorsed:) In the supreme court of the Territory of Hawaii.—Before Presiding Justice Clinton A. Galbraith.—Samuel M. Damon, plaintiff, *v.* The Territory of Hawaii, defendant.—Petition for writ of error.—Filed January 14 A. D. 1903. Henry Smith, clerk of the supreme court of the Territory of Hawaii.

83 In the Supreme Court of the Territory of Hawaii.

Before the Honorable Clinton A. Galbraith, presiding justice of said supreme court.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant. } Action to Establish Fishing Right.

Bond.

Know all men by these presents that we Samuel M. Damon as principal and Henry E. Waity as sure*ties* are held and firmly bound unto the Territory of Hawaii in the full and just sum of five hundred ($500.00) — to be paid to the said Territory of Hawaii to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this 13th day of January A. D. 1903.

Whereas in a suit depending in said court between Samuel M. Damon plaintiff and The Territory of Hawaii defendant, judgment was rendered against said Samuel M. Damon, and the said Samuel M. Damon having obtained a writ of error and filed a copy thereof in the office of the clerk of said supreme court of the Territory of

Hawaii to reverse the judgment in said suit and a citation
84 directed to said Territory of Hawaii citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington in the District of Columbia;

Now the condition of this obligation is such that if the said Samuel M. Damon shall prosecute his said writ of error to effect and answer all costs if he shall fail to make his said plea good then the above obligation to be void otherwise to remain in full force and virtue

S. M. DAMON. [SEAL.]
H. E. WAITY. [SEAL.]

Signed sealed and delivered in the presence of
R. D. SILLIMAN.

Approved:
(Sg.) CLINTON A. GALBRAITH,
Presiding Justice Supreme Court, Territory of Hawaii.

(Endorsed:) In the supreme court of the Territory of Hawaii.—Before Presiding Justice Clinton A. Galbraith.—Samuel M. Damon, plaintiff, *v.* The Territory of Hawaii, defendant.—Bond. Filed January 14 A. D. 1903. Henry Smith, clerk of the supreme court of the Territory of Hawaii.

85 In the Supreme Court of the Territory of Hawaii.

Before the Honorable Clinton A. Galbraith, presiding justice of said supreme court.

SAMUEL M. DAMON, Plaintiff,
vs.
THE TERRITORY OF HAWAII, Defendant.

Order Allowing Writ of Error from the Supreme Court of the United States and Approving Bond.

Desiring to give the petitioner Samuel M. Damon, plaintiff above named, an opportunity to have the decision and judgment of this court rendered in the above entitled cause on the 1st day of December, A. D. 1902, reviewed by the Supreme Court of the United States;

It is ordered that a writ of error be allowed from the said Supreme Court of the United States to the supreme court of the Territory of Hawaii;

It is further ordered that the bond for costs in the penal sum of five hundred dollars, herewith presented, be and the same is hereby approved.

(Sg.) CLINTON A. GALBRAITH,
Presiding Justice of the Supreme Court of the Territory of Hawaii in said Cause.

Dated this 14th day of January, A. D. 1903.

(Endorsed:) In the supreme court of the Territory of Hawaii.—Before Presiding Justice Clinton A. Galbraith.—Samuel M. Damon, plaintiff, *v.* The Territory of Hawaii, defendant.—Order allowing writ of error and approving bond. Filed January 14 A. D. 1903.—Henry Smith, clerk of the supreme court of the Territory of Hawaii.

86 In the Supreme Court of the Territory of Hawaii.

Before the Honorable Clinton A. Galbraith, presiding justice of said supreme court.

SAMUEL M. DAMON, Plaintiff,
v.
THE TERRITORY OF HAWAII, Defendant.

Certificate of Clerk to Transcript.

I, Henry Smith, clerk of the supreme court of the Territory of Hawaii, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 26 to 78 inclusive, contain a true and complete transcript of the record and proceedings had in the above entitled court in the case of Samuel M. Damon, plaintiff, *vs.* The Territory of Hawaii, defendant, as the same remain of record and on file in my office.

I further certify that the foregoing pages numbered from 79 to 85 inclusive contain true and correct copies of the petition for writ of error, bond for costs and order allowing writ or error and approving bond.

In testimony whereof I have caused the seal of said supreme court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory, this 15th day of January, in the year of our Lord one thousand nine hundred and three.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

87 [Endorsed:] In the supreme court of the Territory of Hawaii. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Authenticated transcript of record.

88 [Endorsed:] In the Supreme Court of the United States. Samuel M. Damon, plaintiff in error, *v.* The Territory of Hawaii, defendant in error. Affidavit of value, writ of error, assignment of errors, citation and authenticated transcript of record. Reuben D. Silliman, counsel for plaintiff in error.

Endorsed on cover: File No. 18,822. Hawaii Territory supreme court. Term No. 594. Samuel M. Damon, plaintiff in error, *vs.* The Territory of Hawaii. Filed February 4th, 1903.